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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953.

No. 447

BEARING JOBBERS, INC., M. H. LESCURE AND M. M. LESCURE,

Petitioners,

vs.

NICE BALL BEARING COMPANY, A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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November 23, 1953.

THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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OPINION BELOW.

The opinion of the Court of Appeals (R. 773) is reported in 205 F. (2d) 841. No opinion was filed by the District Court in which the case was tried.

JURISDICTION.

Petitioners invoke the jurisdiction of this Court under 28 U. S. C. 1254, but none of the reasons specified in Rule 38 of this Court as justifying the granting of a writ of certiorari is here present.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals was not well within the accepted and usual course of judicial proceedings in affirming the District Court's decision for reasons not assigned by the District Court.

2. Whether the decision of the Court of Appeals is not correct for reasons other than those referred to in its opinion.

STATEMENT.

This litigation concerns the ownership of the capital stock of Bearing Jobbers, Inc.* Respondent, plaintiff-appellee below, brought suit in 1950 to compel petitioners to recognize respondent as owner (R. 3). Petitioners answered that M. H. Lescure was owner under a purchase agreement of August 7, 1931, and that, even if this agreement was not binding, respondent was barred from relief by the doctrine of unclean hands (R. 7, 9, 54, 64, 68). Lescure filed a counterclaim seeking the return of a stock certificate previously endorsed and delivered by him to respondent and to recover dividends paid to respondent since 1940 (R. 12-14).

The cause was referred to a Master who found that respondent had always been the owner of the Bearing Jobbers stock (R. 747). He doubted whether the agreement of August 7, 1931, was intended to be a binding contract (R. 747, 751) but found that it was executory and had expired by its own terms in 1933 (R. 745, 746, 747, 751). His report included specific findings of fact and conclusions of law (R. 736-752), as well as a narration of the evidence showing that petitioners had always recognized respondent as owner of Bearing Jobbers (R. 705-736).

After a full hearing, the District Court approved the Master's report, adopted his findings and conclusions as its own and entered judgment accordingly (R. 761-762).

The Court of Appeals affirmed, saying (R. 788):

> "* * * No reasonable person could believe Lescure or accept his theory * * *."

* Hereinafter generally referred to as "Bearing Jobbers."

And further (R. 781):

> "* * * no reasonable person could conclude from the evidence that the plaintiff and Lescure intended the instrument dated August 7, 1931, to be a contract between them."

The Court of Appeals found it unnecessary to consider whether the agreement was executory only, or whether, if executed, it had not been rescinded by the conduct of the parties (R. 788), alternative theories urged by respondent on the basis of equally convincing evidence (R. 957-968).

Petitioners filed a petition for rehearing (R. 797), urging the same proposition they urge here, namely, that the issue whether the agreement of August 7, 1931, was intended to be a binding contract was not tried in the District Court or presented on appeal. Following respondent's answer (R. 821) the petition was denied (R. 835).

As will appear, the issue whether the agreement of August 7, 1931, was intended to be a binding contract was tried in the District Court and presented on appeal.

The Proceedings in the District Court.

The question whether the agreement of August 7, 1931, was intended to be a binding contract was presented by the pleadings (R. 9, 15-16, 68, 822) and treated by the parties as an issue throughout the hearings and the arguments before the Master and the District Court (R. 85, 86, 824-827). The parties repeatedly recognized this. As was pointed out by the Court of Appeals (R. 779), petitioners' counsel said at the trial (R. 85):

> "* * * the primary issue in this case, * * * is that contract * * *. Is that a valid, bona fide agreement, or is it not?"

and (R. 86):

> "* * * the issue * * * is, is that agreement bona fide or is it not bona fide."

Petitioners stated in their brief before the Master (R. 825):

> "* * * plaintiff claims that the Master should absolutely disregard the contract of August 7, 1931, * * *."

In its reply brief before the Master respondent said (R. 825):

> "* * * plaintiff was entitled to prove and the evidence in question shows that plaintiff and Lescure never intended to enter into any binding agreement at all."

Petitioners said in their brief before the District Court (R. 826-827):

> "However, if the agreement of August 7, 1931, be ignored * * *, as plaintiff asks this Court to do, * * *."

Respondent said in its brief (R. 827):

> "* * * plaintiff was entitled to prove that plaintiff and Lescure never intended to enter into any binding agreement at all."

Then, having urged all along that the real issue in the case was whether the agreement was a "valid, bona fide" contract or not, petitioners amended their answer, *after trial,* and alleged (R. 68):

> "* * * if plaintiff's position that this transaction was not a sale, but was a sham and a pretense * * *, then * * * plaintiff is barred * * *."

The Appeal.

In their brief in the Court of Appeals petitioners continued to urge that the issue in question was present. They

contended that, even though the instrument of August 7, 1931, was not a binding contract, respondent was still not entitled to relief because the execution of the instrument was part of a fraudulent plan and respondent's hands were unclean (R. 788, 908-916). When respondent urged in its brief (R. 955-957) that the agreement was not intended by the parties to be a valid and binding contract when it was signed, petitioners did not reply that this was not an issue in the case. They met the issue head-on (R. 994-997), and insisted that respondent's contention was not supported by the record.

Petitioners state (Pet. pp. 8-9) that counsel for respondent conceded in the Court of Appeals that petitioners would have prevailed had this action been brought prior to January 10, 1933. Counsel for respondent does not recall that he made such a statement and doubts that he did since there could have been no occasion for a law suit prior to January 10, 1933. The agreement expressly provided that either party could terminate prior to January 10, 1933 (R. 11).

ARGUMENT.

I.

THE DECISION BELOW IS CLEARLY CORRECT.

(1) The Decision Below Is Correct for the Reasons Stated by the Court of Appeals.

The evidence shows beyond a doubt that respondent and Lescure had no intention that the agreement of August 7, 1931, was to be a binding contract between them (R. 705-736, 773). Petitioners' claim that this was an untried issue of which they had no notice is wholly without substance. The issue was raised by the pleadings. Even if it had not been pleaded, it was tried by the express consent of the parties and should be treated in all respects as if it had been pleaded. Rule 15 (b) of the *Federal Rules of Civil Procedure*. That the issue was so tried is shown by the parties' oral and written statements to the Master and the District Court (R. 824-827). It is shown even more clearly by the fact that, after the trial, petitioners deemed it advisable to conform their pleadings more nearly to the proof and amended their answer to allege that "if plaintiff's position that this transaction was not a sale, but was a sham and pretense," then plaintiff's hands are unclean (R. 68).

The issue was present on appeal, too. The briefs of the parties demonstrate this (R. 908-916, 955-957); and the Court of Appeals twice held that the issue was present—first, in its original opinion (R. 779, 788), second, in its denial of the petition for rehearing (R. 835).

The fact that the Court of Appeals reached the same

result as the District Court but for different reasons avails petitioners nothing. The question for determination on appeal was whether the judgment of the District Court was correct, not whether the reasons given therefor were sound. *United States* v. *Holt State Bank*, 270 U. S. 49 (1925). The Court of Appeals was simply following the well recognized rule enunciated earlier in *Barie* v. *Superior Tanning Co.*, 182 F. 2d 724 (C. A. 7, 1950), at page 728:

> "* * * A judgment which is correct must be affirmed even though the trial court relied upon the wrong ground."

It is submitted, therefore, that the decision below is correct for the reasons stated by the Court of Appeals.

(2) The Decision Below Is Also Correct for Reasons Not Stated by the Court of Appeals.

Quite apart from the question sought to be raised by the petition, the evidence shows that the decision of the Court of Appeals was correct for other reasons. As appears from the Master's report (R. 705-752) and from the opinion below (R. 773-791), the evidence is very plainly to the effect that, at the most, the agreement in question was executory and expired by its own terms (R. 745, 746, 747, 751, 957), and that even if it were executed, it was rescinded by the conduct of the parties long prior to 1950 when Lescure sought to enforce it (R. 964).

It is submitted, therefore, that this Court would reach the same result as the Master, the District Court, and the Court of Appeals, even if it were to review the case.

II.

THERE IS NO REASON JUSTIFYING THE GRANTING OF CERTIORARI IN THIS CASE.

The decision below does no more than apply established principles of law to the particular facts of this case. It does not conflict with any decision of this or any other Court; on the contrary, on principle and authority no other decision could have been reached. The sound analysis of the questions presented, both in the Master's report and in the exhaustive opinion of the Court of Appeals, makes unnecessary any further consideration of the issues here.

Twice the Court of Appeals considered the point sought to be raised by the petition, and applying accepted principles to the particular facts, ruled against petitioners. This was no departure from the accepted and usual course of judicial proceedings. It was strictly in accordance with it.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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